

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

TONY ASBERRY,  
CDCR #P-63853,

Plaintiff.

Civil No. 13cv2573 WQH (JLB)

## ORDER

vs.

JEFFREY BEARD, et al.

## Defendants.

HAYES, Judge:

The matter before the Court is the Motion for Preliminary Injunction filed by Plaintiff Tony Asberry. (ECF No. 38).

## I. Background

On October 23, 2013, Plaintiff commenced this action by filing a Complaint in this Court, along with a motion to proceed *in forma pauperis* (“IFP”) and a motion for injunctive relief. (ECF Nos. 1-3). In the Complaint, Plaintiff alleged various Richard J. Donovan Correctional Facility (“RJD”) officials violated his Eighth Amendment right to be free from cruel and unusual punishment by providing him inadequate medical care after he was transferred to RJD in March 2012 from California State Prison-Sacramento. Plaintiff further alleged RJD officials did so in retaliation for his having filed CDC 602 inmate appeals and a prior civil rights action related to his medical care in the Eastern

1 District of California.

2 On April 22, 2014, the Court granted Plaintiff's motion to proceed IFP pursuant  
 3 to 28 U.S.C. § 1915(a), but simultaneously dismissed his Complaint sua sponte for failing  
 4 to state a claim upon which relief could be granted pursuant to 28 U.S.C. § 1915(e)(2) &  
 5 § 1915A(b) and denied the motion for injunctive relief. (ECF No. 15). Specifically, the  
 6 Court dismissed Plaintiff's claims against Defendants Cate and Paramo because his  
 7 pleading "contain[ed] virtually no allegation that either of [them] knew of or took any  
 8 part" in personally causing him constitutional injury. *Id.* at 6-8. The Court further found  
 9 that while Plaintiff's allegations of chronic lower back pain were sufficiently pleaded to  
 10 show an "objectively serious medical need" under the Eighth Amendment, *id.* at 10, he  
 11 failed to allege further facts to show that Defendants Walker, Silva, Denbella, Chow,  
 12 Newton, or Doe acted with deliberate indifference to his need. *Id.* at 11-12. Finally, the  
 13 Court found Plaintiff's allegations of retaliation also failed to state a claim because his  
 14 Complaint did not contain sufficient factual matter to show: (1) that any named defendant  
 15 took adverse action against him because he exercised a constitutional right, (2) that  
 16 defendants' actions failed to advance a legitimate correctional goal, or (3) that his First  
 17 Amendment rights were in any way chilled as a result. *Id.* at 12-13. Plaintiff was granted  
 18 leave to file an amended complaint to correct these deficiencies, and cautioned that any  
 19 claims not re-alleged would be considered waived because an amended pleading  
 20 supersedes the original. *Id.* at 13-14.

21 On June 11, 2014, Plaintiff submitted a First Amended Complaint which deleted  
 22 reference to Defendants Cate, Denbella, and John Doe, Medical Doctor, and re-alleged  
 23 his Eighth Amendment claims against previously-named Defendants Walker, Silva,  
 24 Chow, and Newton, and alleged additional access to courts claims against newly added  
 25 Defendants Beard, Benyard, Allemby, Rutledge, Hernandez, Toledo, Godinez, Morales,  
 26 Taylor, and unidentified Jane and John Does. (ECF No. 24).

27 On June 17, 2014, Plaintiff filed a Motion for Preliminary Injunctive Relief related  
 28 to a "new" policy in RJD Fac-B Building 6, which he described as a "campaign directed

1 at keeping him awake.” (ECF No. 26 at 8). On June 26, 2014, Plaintiff also filed a  
 2 motion requesting court-ordered “physical library use” (ECF No. 28).

3 In the interim, on June 24, 2014, Plaintiff filed a Notice indicating his desire to file  
 4 a Second Amended Complaint, based on the contention that he “never received” the  
 5 Court’s April 22, 2014 Order dismissing his original complaint for failing to state a claim,  
 6 and therefore, he did not have the “opportunity to correct his mistake[s]” when he filed  
 7 his First Amended Complaint. (ECF No. 27 at 2). On June 30, 2014, Plaintiff submitted  
 8 a Second Amended Complaint, and the Court accepted it for filing as the operative  
 9 pleading in light of the liberality required by Federal Rule of Civil Procedure 15,  
 10 Plaintiff’s pro se status, and his claims of non-receipt as alleged in his June 24, 2014  
 11 Notice.<sup>1</sup> (ECF No. 31); *see also* Fed. R. Civ. P. 15(a)(2) (“The court should freely give  
 12 leave [to amend] when justice so requires.”); *United States v. Webb*, 655 F.2d 977, 979  
 13 (9th Cir. 1981) (“Rule 15’s policy of favoring amendments to pleadings should be  
 14 applied with extreme liberality.”) (internal quotation omitted); *Eldridge v. Block*, 832  
 15 F.2d 1132, 1135 (9th Cir. 1987) (applying Rule 15’s leave to amend standards “even  
 16 more liberally to pro se litigants.”).

17 On August 12, 2014, the Court denied Plaintiff’s motions for library use and for  
 18 injunctive relief, and sua sponte dismissed Plaintiff’s Second Amended Complaint  
 19 pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1). (ECF No. 34). Specifically,  
 20 the Court found that Plaintiff’s Second Amended Complaint again failed to state an  
 21 Eighth Amendment inadequate medical care claim as to Defendants Paramo, Beard,  
 22 Walker, Silva, Chow, and Newton, and therefore, found further amendment as to those  
 23 claims futile. *Id.* at 5-9, 16. The Court also found Plaintiff’s Second Amended

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24  
 25 <sup>1</sup> The Court’s docket indicated that its April 22, 2014 Order (ECF No. 15), was  
 26 served upon Plaintiff by mail at the address currently listed in the docket, and was *not*  
 27 returned as undeliverable by the United States Post Office. *See In re Bucknum*, 951 F.2d  
 28 204, 207 (9th Cir. 1991) (“Mail that is properly addressed, stamped, and deposited into  
 the mail is presumed to be received by the addressee . . . The presumption can only be  
 overcome by clear and convincing evidence that the mailing was not, in fact,  
 accomplished.”); *see also Nunley v. City of Los Angeles*, 52 F.3d 792, 796 (9th Cir. 1995)  
 (noting that where court’s docket included notations that a judgment was mailed and not  
 returned by the post office, its receipt may be assumed).

1 Complaint failed to state an access to courts claim against Defendants Benyard, Allemby,  
 2 Rutledge, Hernandez, Toledo, Godinez, Morales, and Taylor, but granted him forty-five  
 3 days leave in which to file a Third Amended Complaint which addressed the deficiencies  
 4 of pleading identified as to those claims and as to those defendants only.<sup>2</sup> *Id.* at 9-13, 17.  
 5 Plaintiff was cautioned, however, that “should his Third Amended Complaint still fail to  
 6 state an access to courts claim upon which relief may be granted, or should he otherwise  
 7 fail to comply with [the Court’s] Order, his civil action w[ould] be dismissed in its  
 8 entirety, without further leave to amend, and [might] hereafter be counted as a “strike”  
 9 against him pursuant to 28 U.S.C. § 1915(g).” *Id.* at 18 n.6.

10 On October 28, 2014, the Court issued an order dismissing this case without  
 11 prejudice for failure to file a Third Amended Complaint within forty-five days of the  
 12 Court’s August 12, 2014 Order and for failing to state a claim pursuant to 28 U.S.C.  
 13 sections 1915(e)(2)(B)(ii) and 1915A(b)(1). (ECF No. 35). On October 29, 2014, the  
 14 Clerk of the Court entered judgment of dismissal without prejudice. (ECF No. 36).

15 On December 2, 2014, Plaintiff filed the Motion for Preliminary Injunction. (ECF  
 16 No. 38).

## 17 **II. Discussion**

18 To date, Plaintiff has not filed a Third Amended Complaint in this case. Because  
 19 Plaintiff did not file a Third Amended Complaint within the time ordered by the Court  
 20 on August 12, 2014, the Court dismissed this case without prejudice on October 28, 2014  
 21 and judgment was entered on October 29, 2014. (ECF Nos. 34-36). Since that time,  
 22 Plaintiff has not filed a motion to reopen the case or a motion for leave to file a Third  
 23 Amended Complaint. Because this case has been dismissed, Plaintiff’s Motion for  
 24 Preliminary Injunction is denied.

25  
 26 <sup>2</sup> Because Plaintiff’s Second Amended Complaint failed to included previously  
 27 named Defendants Cate and Denbella as parties, the Court noted any purported claim as  
 28 to them was considered waived. *See* ECF Doc. No. 34 at 6 n.3 (citing *King v. Atiyeh*, 814  
 F.2d 565, 567 (9th Cir. 1987)). The Court further dismissed all unidentified Doe  
 Defendants based on Plaintiff’s failure to allege any plausible claim for relief against  
 them. *Id.* at 13-14, 17.

1           **III. Conclusion**

2           IT IS HEREBY ORDERED that the Motion for Preliminary Injunction (ECF No.  
3 38) is DENIED.

4           DATED: December 22, 2014

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6           **WILLIAM Q. HAYES**  
7           United States District Judge

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